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Appeal Filed: 10/10/2019
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Staff: Mike Watson - SC
Staff Report: 11/22/2019
Hearing Date: 12/13/2019

APPEAL STAFF REPORT: SUBSTANTIAL ISSUE DETERMINATION ONLY

Appeal Number: A-3-CML-19-0200

Applicant: Verizon Wireless

Appellant: Verizon Wireless

Local Government: City of Carmel-by-the-Sea

Local Decision: Coastal development permit application number UP 19-130 denied by the City of Carmel-by-the-Sea Planning Commission on June 12, 2019, and that denial upheld through an appeal to the City Council on September 10, 2019.

Location: Generally located south of 10th Avenue and west of Junipero Avenue at: San Antonio Avenue one block NW of 10th Avenue (Site 1), San Antonio Avenue three blocks SE of 13th Street (Site 2), 10th Avenue NW of Dolores Street (Site 3), Lincoln Street three blocks NE of 12th Avenue (Site 4), and Mission Street two blocks SW of 12th Avenue (Site 5), in the City of Carmel-by-the-Sea, Monterey County.

Project Description: Installation, operation, and maintenance of five wireless communication facilities mounted on two existing and three replacement PG&E utility poles located within the public rights-of-way; installation of bollards; and related development.

Staff Recommendation: No Substantial Issue

Important Hearing Procedure Note: This is a substantial issue only hearing. Testimony will be taken only on the question of whether the appeal raises a substantial issue. Generally and at the discretion of the Chair, testimony is limited to three minutes total per side. Please plan your testimony accordingly. Only the Applicant, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify. Others may submit comments in writing. If the Commission determines that the appeal does raise a substantial issue, the de novo phase of the hearing will occur at a future Commission meeting, during which the Commission will take public testimony.

SUMMARY OF STAFF RECOMMENDATION

The City of Carmel-by-the Sea denied a coastal development permit (CDP) for expanded wireless communication facilities mounted on two existing and three replacement utility poles at five locations within the City's low-density residential (R-1) district. The project sites are generally south of the commercial district and are bounded by Tenth Avenue and Thirteenth Avenue and Junipero Avenue and San Antonio Avenue.

Carmel is a very popular visitor destination, known around the world for its coastal setting, residential and forested landscape, and white sand beach. Carmel village is considered a unique asset of statewide and national significance and is an LUP-designated special community and a highly scenic area within the meaning of Coastal Act Sections 30253(e) and 30251.

The Appellant contends that the City's denial raises questions relating to LCP obsolescence, required findings for denial under the Federal Telecommunications Act ("TCA"), assessment of visual impacts under the LCP, and broader compliance with the TCA. After reviewing the local record, Commission staff has concluded that the denied project does not raise a substantial issue with respect to the project's conformance (specifically lack thereof) with the City's LCP.

The City has provided the factual and legal support demonstrating that the denied wireless facilities expansion was inappropriate and inconsistent with the City's LCP land use, wireless facilities, and scenic resource provisions. Specifically, all five wireless facility sites were proposed in the public rights-of-way within the low density residential (R-1) planning district where there is a strict LCP prohibition on wireless communication facilities. The Appellant did not adequately demonstrate that its wireless facilities met federal safety standards with respect to radio frequency emissions, as required by the LCP. Further, the City found that the proposed wireless facilities would create visual clutter and introduce a level of urban development into an area designated by the LCP as both highly scenic and a special community. Specifically, the City found that utility poles needed to accommodate the project would be out of scale and incompatible with both the residential character of the neighborhood and dramatically taller than the average utility pole within the R-1 district, and the canisters and equipment boxes mounted on the utility poles would create visual clutter

Finally, the Appellant's claims regarding state and federal preemption of the LCP are not a valid basis for appeal, including because the grounds for appeal to the Commission of a denial of a permit are limited to an allegation that the development conforms to the standards set forth in the certified LCP. Whether the City's decision or the certified LCP provisions themselves violate the TCA are issues outside the scope of the allowable grounds for an appeal to the Commission of a

denial of a CDP application. Notwithstanding the above, the City evaluated the project for consistency with the LCP and found that it did not comport with the relevant underlying LCP policies and took an action to deny the project.

As a result, staff recommends that the Commission determine that the appeal contentions do not raise a substantial LCP conformance issue, and that the Commission decline to take jurisdiction over the CDP for this project. The single motion necessary to implement this recommendation is found on page 5 below.

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APPENDICES

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Appendix B – Staff Contact with Agencies and Groups

EXHIBITS

Exhibit 1 – Project Site Map

Exhibit 2 – Project Site Images and Photographic Simulations

Exhibit 3 – City’s Final Local Action Notice

Exhibit 4 – Denied Project Plans

Exhibit 5 – Appeal of City’s CDP Decision

Exhibit 6 – Applicable LCP Policies and Standards

I. MOTION AND RESOLUTION

Staff recommends that the Commission determine that **no substantial issue** exists with respect to the grounds on which the appeal was filed. A finding of no substantial issue would mean that the Commission will not hear the application de novo and that the local action will become final and effective. To implement this recommendation, staff recommends a **YES** vote on the following motion. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of a majority of the Commissioners present.

***Motion:** I move that the Commission determine that Appeal Number A-3-CML-19-0200 raises no substantial issue with respect to the grounds on which the appeal has been filed under Section 30603. I recommend a yes vote.*

***Resolution to Find No Substantial Issue.** The Commission finds that Appeal Number A-3-CML-19-0200 does not present a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.*

II. FINDINGS AND DECLARATIONS

A. PROJECT LOCATION, DESCRIPTION, AND BACKGROUND

The City-approved project is located within the City of Carmel-by-the-Sea (Carmel). The City is located on the southern edge of the Monterey Peninsula and fronts Carmel Bay and its world-renowned white sandy beach. It is often stated that Carmel, along with such other distinct communities as the town of Mendocino, is one of the special communities for which Coastal Act Section 30253(e) was written. Carmel is a very popular visitor destination, known around the world for its coastal setting, forested landscape, and white sand beach. As a primarily residential community, the established pattern of development in Carmel plays a key role in defining the special character of the City. Such elements include the informal streetscapes, small well-built cottages (many of which are historic homes), and the visual quality established by the diversity of architecture and integration of homes into the natural forest environment. Together, Carmel Beach, the residential and forest character, and extraordinary vistas combine to form a world-renowned, popular, and visually striking visitor-serving destination. The village is considered a unique asset of statewide and national significance and is designated in the City's certified Land Use Plan (LUP) as a special community and a highly scenic area within the meaning of Coastal Act Sections 30253(e) and 30251.

The wireless facilities denied by the City would be located on two existing and three replacement electric utility poles at five locations within the single-family residential (R-1) zone district, which is located generally south of 10th Avenue and west of Junipero Avenue. More specifically, the sites are located at: 1) San Antonio Avenue, one block northwest of 10th Avenue, 2) San Antonio Avenue, three blocks southeast of 13th Avenue, 3) 10th Avenue, northwest of Dolores Street, 4) Lincoln Street, three blocks northeast of 12th Avenue, and 5) Mission Street, two blocks southwest of 12th Avenue. The project includes installation of two utility pole extenders on two existing poles (each extender seven feet in height), and three utility pole replacements,

with all three of the new poles being more than 11 feet greater in height than the existing poles. Each wireless facility would include a three-foot-tall canister (which would contain antennas) mounted to the top of a utility pole and a six-foot-tall equipment cabinet mounted on a utility pole nine feet above grade. The equipment cabinets would contain a remote radio unit, power supply, and other associated equipment. A disconnect switch and a PG&E smart-meter would be mounted below each equipment cabinet. Finally, bollards would be placed around the base of the three replacement utility poles (sites 2, 4, and 5) within the street right-of-ways. The canisters, equipment cabinets, and bollards would be painted a matte brown color.

Finally, the City of Carmel-by-the-Sea LCP was certified by the Commission in 2004 and is comprised of a coastal LUP and an Implementation Plan (IP). The LCP, as expressed by the two documents, contains the policies, standards, and regulations necessary to preserve and maintain the “village in a forest” character that is the aesthetic foundation of the community. This includes IP Chapter 17.46: Telecommunications and Wireless Facilities, which sets forth the design review standards for wireless communication facilities within the village, such as the wireless facilities that are the subject of this appeal.

See **Exhibit 1** for a location map; see **Exhibit 2** for photographs of the project sites and the surrounding areas, as well as photo-simulations of the wireless facilities; and see **Exhibit 4** for the City-denied project plans.

B. CITY OF CARMEL-BY-THE-SEA CDP DENIAL

On June 12, 2019 the City of Carmel-by-the-Sea Planning Commission (PC) denied a CDP for the proposed wireless facilities project. The PC’s decision was appealed by the Applicant to the City Council which, after deliberation, upheld the PC’s decision and denied the appeal on September 10, 2019. See **Exhibit 3** for the City’s Final Local Action Notice.

The City’s Final Local Action Notice was received in the Coastal Commission’s Central Coast District Office on Thursday, September 26, 2019. The Coastal Commission’s ten-working-day appeal period for this action began on Friday September 27, 2019 and concluded at 5 p.m. on Thursday October 10, 2019. One valid appeal (see below) was received during the appeal period.

C. APPEAL PROCEDURES

Coastal Act Section 30603 provides for the appeal to the Coastal Commission of certain CDP decisions in jurisdictions with certified LCPs. The following categories of local CDP decisions are appealable: (a) approval of CDPs for development that is located (1) between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance, (2) on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff, and (3) in a sensitive coastal resource area; or (b) for counties, approval of CDPs for development that is not designated as the principal permitted use under the LCP. In addition, any local action (approval or denial) on a CDP for a major public works project (including a publicly financed recreational facility and/or a special district development) or an energy facility is appealable to the Commission. This project is appealable because it is a major public works project.

The grounds for appeal under Section 30603 are limited to allegations that the development does not conform to the certified LCP or to the public access policies of the Coastal Act. Section 30625(b)(2) of the Coastal Act requires the Commission to consider a CDP for an appealed project de novo unless a majority of the Commission finds that “no substantial issue” is raised by such allegations.¹ Under Section 30604(b), if the Commission conducts the de novo portion of an appeals hearing (upon making a determination of “substantial issue”) and finds that the proposed development is in conformity with the certified LCP, the Commission must issue a CDP. If a CDP is approved for a project that is located between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone, Section 30604(c) also requires an additional specific finding that the development is in conformity with the public access and recreation policies of Chapter 3 of the Coastal Act. This project is not located between the nearest public road and the sea and thus this additional finding would not need to be made (in addition to a finding that the proposed development is in conformity with the Carmel-by-the-Sea certified LCP) if the Commission were to approve the project following the de novo portion of the hearing (if the Commission first found substantial issue with respect to the appeal).

The only persons qualified to testify before the Commission on the substantial issue question are the Applicant, persons opposed to the project who made their views known before the local government (or their representatives), and the local government. Testimony from other persons regarding the substantial issue question must be submitted in writing. Any person may testify during the de novo CDP determination stage of an appeal (if applicable).

D. SUMMARY OF APPEAL CONTENTIONS

The Appellant contends that the City’s denial raises questions relating to LCP obsolescence, required findings for denial under the TCA, assessment of visual impacts under the LCP, and broader compliance with the TCA. More specifically, the Appellant asserts that the LCP was certified prior to the development of “small cell” wireless technology and thus the LCP standards are out-of-date. Additionally, the Appellant contends that the City’s findings for denial on the grounds of zoning restrictions, radio frequency emission standards, and aesthetics are erroneous and unsupported by substantial evidence as a matter of federal law. The Appellant further claims that the LCP telecommunications development standards, as currently certified, are all preempted by state law and the TCA. Please see **Exhibit 5** for the appeal contentions.

¹ The term “substantial issue” is not defined in the Coastal Act or in its implementing regulations. In previous decisions on appeals, the Commission has considered the following factors in making substantial issue determinations: the degree of factual and legal support for the local government’s decision; the extent and scope of the development as approved or denied by the local government; the significance of the coastal resources affected by the decision; the precedential value of the local government’s decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance. Even when the Commission chooses not to hear an appeal (by finding no substantial issue), appellants nevertheless may obtain judicial review of a local government’s CDP decision by filing a petition for a writ of mandate pursuant to the Code of Civil Procedure, Section 1094.5.

E. SUBSTANTIAL ISSUE DETERMINATION

1. LCP Standards Out-of-Date

The Appellant contends that the City's LCP was certified a decade prior to development of "small cell" wireless facilities and federal regulation of the technology. As a consequence, the Appellant contends that the standards and other criteria contained in the LCP are out-of-date, and that the LCP does not contemplate the placement of small cell wireless facilities on existing and replacement utility and light poles.

As noted in the background section above, the City's LCP was certified in 2004 and contains the policies, standards, and regulations necessary to preserve and maintain the "village in a forest" character that is the aesthetic foundation of the community. This includes IP Chapter 17.46: Telecommunications and Wireless Facilities (see **Exhibit 6**), which establishes comprehensive requirements and development standards for the siting, design, construction, maintenance and monitoring of wireless communication facilities in Carmel-by-the-Sea. At the time of LCP certification, the City recognized the need to include such regulations for early generation wireless facilities, including to ensure that the scenic quality of the City's residential neighborhoods is protected over time. IP Chapter 17.46 requires adherence to applicable objectives and policies of the LCP (see **Exhibit 6**), such as LCP Policy 17.46.10.B, which requires that new development minimize adverse aesthetic impacts, and LCP Policy/Objective 17.46.40.C, which requires that wireless communication facilities, to every extent possible, not be sited to create visual clutter or negatively affect important public or private views. IP Chapter 17.46 also requires compliance with Federal Communications Commission (FCC) and California Public Utility Commission rules, regulations, and standards. Thus, the requirements of IP Chapter 17.46 and the referenced LUP policies/objectives remain relevant and applicable to both early-generation wireless facilities and current "small cell" wireless. Whether the LCP standards as certified are now "obsolete" or "out of date" *as a matter of compliance with any applicable federal law and rules* such as the TCA is beyond the scope of the grounds for appeal of the City's denial of the project as a major public works project per 30603(b)(2) of the Coastal Act, as further discussed below in Section 4 of this report regarding preemption. Thus, no substantial issue exists with regard to the Appellant's first contention.

2. Erroneous Findings of Denial

The Appellant asserts that the City's denial was based on three primary findings: 1) project inconsistency with the underlying R-1 zone district, 2) lack of compliance with FCC's radio frequency (RF) emission standards, and 3) the aesthetic impacts of the proposed small cell wireless facilities. The Appellant contends that these findings are erroneous and unsupported by substantial evidence.

As stated above, the LCP includes a stand-alone chapter on telecommunications and wireless facilities (IP Chapter 17.46), which sets forth the design review standards for wireless communication facilities within the village. The stated purpose of the IP Chapter 17.46 is to "*promote the public health, safety and community welfare; preserve natural resources and scenic quality; and protect the health and character of the City's residential neighborhoods.*" IP Chapter 17.46 requires a use permit and design review for wireless communication facilities and

any development within the coastal zone that qualifies as a project requires a coastal development permit.

Chapter 17.46 of the City's LCP Zoning Ordinance contains zoning standards applicable to the denied wireless facilities expansion and states, in relevant part:

***IP Section 17.46.20 A.** Wireless communication facilities shall be allowed within all zones except the R-1 district. Such facilities shall be discouraged in open space areas, areas of extraordinary scenic quality and in the R-4 district.*

***IP Section 17.46.40 C.** Wireless communication facilities, to every extent possible, should not be sited to create visual clutter or negatively affect important public or private views as determined by the Planning Commission. Wireless communication facilities are discouraged in the public right-of-way.*

***IP Section 17.46.30.** Prior to the issuance of building permits, the approved telecommunications carrier shall submit an installation test plan for approval by the Department that describes the type of testing that will be performed in order to verify that operation of the facility will remain compliant with its licensing specifications and will not create adverse frequency impacts resulting in health hazards or interference with existing wireless facilities, network communications, computers, appliances, etc. in the vicinity. Upon activation, the approved telecommunications carrier shall submit the test results to the Department of Community Planning and Building. The City may require an approved carrier to conduct frequency testing at any time and report results to the City.*

In addition, IP Chapter 17.08 contains the relevant standards and guidelines applicable to the project in the residential zone districts.

***IP Section 17.08.010.** The purposes of the residential zoning districts are to maintain the residential village character of the City and encourage originality, flexibility, and diversity in residential design that respects the forest setting, the constraints of each site and the surrounding neighborhood.*

Likewise, IP Chapter 17.20 provides the relevant standards applicable to the project within the Beach & Riparian Overlay District, where two of the wireless facilities would be located.

***IP Section 17.20.160.A1.** View Protection. Permitted development shall be sited and designed to protect public views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of the surrounding areas, and where feasible, to restore and enhance visual quality in visually degraded areas, while ensuring the private property owner reasonable development of land.*

R-1 Zoning District

All five wireless facility sites would be located in the public rights-of-way between Tenth and Thirteenth Avenues and Junipero and San Antonio Streets, i.e. an area zoned entirely for low

density residential development (R-1). Development within both the public right-of-way and on private residential parcels are required to adhere to the R-1 standards contained in the certified LCP, which includes a strict prohibition on wireless communication facilities in the R-1 district and discouragement of said facilities within public rights-of-ways. Specifically, the project does not comply with the location requirements of IP Sections 17.46.20 A and 17.46.40 C, and the City made appropriate findings related to the project's inconsistency with these IP sections. Therefore, this contention does not raise a substantial issue with respect to the City's denial of the project based on the LCP's prohibition of wireless facilities in the R-1 zoning district.

RF Emissions

The LCP requires the facilities to be installed and operated in compliance with all regulations, including federal standards for RF emissions (IP Section 17.46.30). As noted in the City's staff report, Title 47 Section 332(c)(7)(B)(iv) of the United States Code provides that a local government can require that RF emissions comply with FCC standards, but this provision precludes a city or county from making a decision based on health or environmental concerns if the emissions meet federal standards.

The Applicant submitted a report stating that the proposed facilities, with the application of mitigation measures, comply with FCC guidelines limiting public exposure to RF energy. Those measures include providing appropriate RF safety training to all workers who have access within 22 feet of the canisters containing the antennas, prohibiting access to within five feet while any antenna is in operation, and posting caution signs on the poles below the canisters/antennas and the equipment boxes.

The City noted in its denial that the report assumed that the only individuals who might come in close contact with the RF antenna are utility pole workers, and that such workers would have adequate warning via posted caution signs on the pole, as well as knowledge of RF emissions issues gained through experience. The City maintains that the report did not consider that residents, or persons hired by residents, performing maintenance activities such as tree maintenance workers, painters, roofers, etc., might also work in close proximity to the antenna and wireless facilities. In addition, the report recommended safety training be provided to all workers who have access within 22 feet of the antenna itself but does not indicate specifically who would receive the training and by what means the safety training would be provided. Thus, the City found that the RF analysis was not based on proper assumptions and that the mitigation measures were insufficient to ensure public safety and therefore compliance with FCC RF emission standards could not be verified.

As noted above, although federal law precludes local jurisdictions from simply denying a permit based on health and safety concerns if the federal emissions standards are met, it does not necessarily preclude jurisdictions from requiring a carrier to demonstrate that its wireless facilities meet said standards. In accordance with these guidelines, the certified LCP requires a description of the type of testing that will be performed in order to verify that operation of the facility will remain compliant with its licensing specifications, and also requires a demonstration that RF emissions will not create adverse health hazards. Given the established pattern of residential development on small lots, the forested environment, and narrow rights-of-way in the vicinity of the project sites, it is not unreasonable to assume that persons other than utility pole

workers might come into close proximity of the wireless facilities' antennas and be subject to RF emissions that may exceed federal standards. The Applicant's report does not account for this likelihood and thus compliance with FCC's RF emission standards had not been demonstrated as required by IP Section 17.46.30. Therefore, this contention does not raise a substantial issue with respect to the City's denial of the project based on LCP provisions that apply to RF emissions.

Aesthetic Impacts

With regard to the Appellant's contention that the project will not result in aesthetic impacts, the co-location of wireless facilities on existing utility poles does take advantage of existing infrastructure in the public right-of-way and may help to limit the aesthetic impacts of same. Nonetheless, in this case, three of the five poles would be replaced with new poles that would each be 11 feet taller than the existing poles, and each of these new poles would have a three-foot high canister (containing antennas) mounted to the top of each pole. Thus, including the poles and the canisters, these new poles would be 14 feet higher than the existing poles. The two poles would be retained and a seven-foot-tall pole extension would be installed atop each of these poles with the three-foot canister mounted to the top of the pole extension, meaning the existing poles, when extended and with the canisters, would be about 10 feet taller than the existing poles.²

A 24 cubic foot (i.e., 6 feet x 2 feet x 2 feet) equipment cabinet (containing remote radio units, power supply, and other components) would be mounted to the side of each utility pole approximately nine feet above the ground. A disconnect switch, a PG&E smart meter, and required RF warning signage would be mounted below the cabinet on each pole. In addition, bollards would be placed in the public rights-of-way around each of the three utility poles to be replaced (sites 2, 4, and 5). The canisters, the equipment cabinets, and the bollards would be painted a matte brown color to blend in with the wooden utility poles.

As noted in the background section above, the City of Carmel-by-the-Sea is a highly scenic, popular visitor-serving destination, known around the world for its coastal setting, forested landscape, and established pattern of development. The R-1 district is devoid of many urbanized facilities, including sidewalks, traffic lights, streetlights, curbs, and gutters. The paved residential streets and roadways are narrow and the rights-of-way shoulders are unpaved and undeveloped. For all these reasons, the entire village is considered a unique asset of statewide and national significance and is an LUP-designated special community and a highly scenic area within the meaning of Coastal Act Sections 30253(e) and 30251.

In terms of impact, the City found that the proposed small cell wireless facilities described above would create visual clutter in a highly scenic area. The City specifically noted that the size of the equipment cabinet and the signage and bollards below the cabinet would create visual clutter on the utility pole at a height that is easily visible to the public and adjacent residences. The City also pointed out that the maximum residential height limit in the R-1 district is 24 feet and that the proposed replacement and extended utility poles would be about 16 to 25 feet taller than the existing residences. Granted, utility poles are not subject to the R-1 height standards, however, they are required to maintain the residential village character (IP Section 17.08.010) and

² Overall heights of the poles, existing and new, would range from 40 ½ feet to 49 ½ feet in height.

otherwise be compatible with the surrounding neighborhood context (17.20.160.A.1). In this case, the poles with the canisters would be out of scale and incompatible with both the residential character of the neighborhood and dramatically taller (by up to 14 feet) than the typical utility pole within the R-1 district. (As discussed previously, even the co-located wireless facilities would result in extended poles 10 – 14 feet taller than the *existing* poles.) Accordingly, the City found the project to be inconsistent with IP provisions for development within the R-1 district (specifically, IP Section 17.08.010) and within the Beach and Riparian Overlay District (specifically, IP Section 17.20.160.A1).

In sum, the City thoroughly evaluated the proposed project for consistency with the certified LCP, and found the project to be inconsistent with the above-cited requirements of the LCP and thus acted to deny the project. Accordingly, no substantial issue exists with respect to the City's interpretation of the LCP. Therefore, the Appellant's contention that the City's findings with respect to aesthetics are erroneous and unsupported by substantial evidence does not raise a substantial issue with respect to the City's denial of the project based on LCP provisions that protect the aesthetics of Carmel.

3. Visual Impacts

The Appellant asserts that the facilities would not have significant view impacts including because the “courts have consistently determined that placing similar equipment on utility poles in the rights-of-way has no significant visual or other environmental impacts. *Robinson v. City and County of San Francisco* (2012) 208 Cal.App.4th 950; *see also, San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012.”

The Appellant's reliance on these two cases does not raise a substantial issue with respect to the specific LCP provisions the City applied in denying the CDP application on the basis of LCP inconsistency because these two cases relate to visual resource impact assertions under the California Environmental Quality Act (“CEQA”), rather than the Coastal Act or Coastal Act-derived LCPs. Furthermore, these two cases do not stand for as broad and categorical a proposition as the Appellant asserts, that “placing similar equipment on utility poles in the rights-of-way has no significant visual or other environmental impacts.”

Robinson v. City and County of San Francisco (2012) 208 Cal.App.4th 950 merely held that in the context of whether the “cumulative impact exception” applies to a CEQA categorical exemption, the plaintiff did not identify evidence supporting a fair argument that the cumulative impact of a project, when considered with other similar installations, would have an adverse visual or auditory impact on the environment. (*Id.* at 959.) Here, the City's denial on the basis of inconsistency with LCP visual resource provisions is not premised on a finding of cumulative impacts of the proposed development. Similarly, *San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012 merely held that in the context of whether the “unusual circumstances exception” applies to a CEQA categorical exemption, “[t]here is no basis to conclude the addition of 726 additional utility cabinets would be “unusual” in the context of the [San Francisco's] urban environment, which is already replete with facilities mounted on the public rights-of-way.” (*Id.* at 1026.) Here, for purposes of consideration of visual resource impacts, the City's R-1 zoning district is clearly and materially distinguishable from the highly

urban environment of San Francisco. Thus, this contention does not raise a substantial issue in terms of the project's conformance (or lack thereof) with the certified LCP.

4. Appellant's Claims Regarding Preemption Are Not A Valid Basis for Appeal

The Appellant's assertion that the appeal *vis a vis* challenge to the City's findings on the basis of preemption "present a substantial issue" misses the mark. The City's denial of the proposed development is appealable on the basis that the project constitutes a "major public works project" per Coastal Act section 30603(a)(5). (*See also* Coastal Act Section 30114 [public works] and 14 California Code of Regulations Section 13012 [major public works and energy facilities].) Importantly, Coastal Act Section 30603(b)(2) states in relevant part: "The grounds for an appeal of a denial of a permit pursuant to paragraph (5) of subdivision (a) ***shall be limited to an allegation that the development conforms to the standards set forth in the certified local coastal program***" (emphasis added). For this reason alone, the appeal warrants a finding of no substantial issue. In other words, whether the City's findings (or whether the applicable certified LCP provisions in and of themselves) violate the TCA – an issue for which the Commission offers no opinion – are simply outside the scope of the allowable grounds for an appeal of a local denial of a CDP application for a major public works project as a jurisdictional matter under the Coastal Act.

The effect of a finding of no substantial issue is that the Commission does not "hear the appeal." (*See* Coastal Act Section 30625(b)(2).) In other words, the Commission does not provide a *de novo* hearing on the CDP application when the Commission finds that an appeal raises no substantial issue of conformity with the LCP. (*Id.* Section 30621.) Therefore, the Commission does not take substantive action on the City's CDP denial, and any assertion that the City's denial may violate the TCA is more appropriately directed to the City, rather than the Coastal Commission. In the event that the Commission (1) found substantial issue, (2) considered the CDP application *de novo*, and (3) denied the CDP application, then perhaps the Appellant's arguments regarding TCA preemption would be appropriately directed to the Commission and the Commission would need to evaluate the TCA preemption argument before making a final decision. However, that is not the case here (and it would be superfluous for the Commission to hear an appeal of the City's denial following a finding of substantial issue and then to deny the CDP application on *de novo*, given that the City has already denied a CDP for the proposed development).

Notwithstanding all of the above, even addressing the Appellant's substantive arguments on the merits, the Commission is justified in finding no substantial issue on the appeal of the City's CDP denial.

California Public Utilities Code Section 7901 preempts the LCP

In its appeal, the Appellant asserts that "Pursuant to the City's Code, the great majority of the public rights-of-way in Carmel are either absolutely or presumptively off-limits for wireless facilities. These restrictions are preempted by and violate State law, which grants telephone corporations, like Verizon Wireless, the right to place their equipment 'upon any public road or highway, along or across any of the waters or lands within this State.' Cal. Pub. Util. Code § 7901."

First, as the Appellant appears to admit in its appeal, Public Utilities Code section 7901 (“Section 7901”) does not provide wireless facilities unfettered authority to place their equipment in public right-of-ways. Further, contrary to the Appellant’s assertion, case law seems to suggest that Section 7901 has little to no preemptive effect. (*See City of Huntington Beach v. PUC* (2013) 214 Cal.App.4th 566, 590 [“The right of telephone corporations to construct telephone lines in public rights of way is not absolute”]; *see also T-Mobile West LLC v. City and County of San Francisco* (2016) 3 Cal.App.5th 334, 349 [“Instead of preempting local regulation, the statutory scheme (§§ 2902, 7901, 7901.1) ... suggest the Legislature intended the state franchise would coexist alongside local regulation”].)

Additionally, as a matter of law, the Appellant provides no meaningful analysis to explain how the legal standards for express or implied preemption developed through case law are satisfied in relation to the interaction of the LCP provisions in question and Section 7901. (*See, e.g., O’Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068 [explaining the legal standards for express and implied preemption].) Likewise, as a factual matter, the Appellant does not explain how IP Section 17.46.040.C, which “discourages” wireless facilities in the public right-of-way, results in public right-of-ways being “either absolutely or presumptively off-limits for wireless facilities.” Ultimately, the Appellant’s assertion that Section 7901 preempts application of the relevant LCP provisions is not justified as a matter of law or on the facts, nor does it raise a substantial issue as to whether the proposed development conforms with the LCP standards. Thus, a finding of no substantial issue is warranted pursuant to Coastal Act Section 30625(b)(2) with respect to the grounds on which the appeal has been filed pursuant to Coastal Act Section 30603(a)(5).

Appellant has not justified that LCP visual resource policies are preempted

The Appellant asserts that “the City’s criteria for approval do not comply with federal law. Local wireless regulations based on aesthetics must be both objective and reasonable. *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC 18-133 (September 27, 2018) (the ‘*Small Cell Order*’). Vague, subjective standards violate this requirement because they make it impossible for carriers to determine in advance what is permissible.”

Assuming for the sake of discussion the validity of the positions set forth in the FCC’s Small Cell Order 18-133 cited to by the Appellant, particularly with respect to Sites 1 and 2 within the Beach & Riparian Overlay District, IP Section 17.20.160.A.1 arguably is both objective and reasonable for purposes of consistency with the TCA. This LCP provision requires the protection of “public views to and along the ocean and scenic coastal areas.” At a minimum, this provision requires protection of (1) views to and along (2) the ocean and scenic coastal areas (3) from public viewpoints. In any case, it is not apparent how the development as proposed has been designed in a manner to meet these standards.

It is also worth noting that this LCP visual resource provision is generally applicable to *all* development proposed within the Beach & Riparian Overlay District, and is not targeted towards nor applied discriminatorily to wireless facility proposals. The fact that this LCP provision is (successfully) applied routinely to all development within the Beach & Riparian Overlay District, and proposed development is modified as a condition of approval when necessary to

ensure consistency with this provision, speaks to the reasonableness of this LCP provision as a general matter.

In any case, the City is the siting authority that applied IP Section 17.20.160.A.1 in the first instance when it denied the proposed development due to LCP visual resource protection inconsistency, and presumably it considered whether application of this IP section would conflict with FCC Small Cell Order 18-133 and/or the TCA. On this point, it is worth noting that the City's denial findings state: "Legal counsel has advised the City that we should adhere to our local regulations and not assume that they are preempted by Federal or State Law." Thus, the Appellant's assertions in this regard are more appropriately directed to the City, rather than the Coastal Commission. To summarize, the Appellant's assertion that the LCP's visual resource protection provisions do not comply with FCC Order 18-133 and/or the TCA has no bearing on whether the proposed development is consistent with the LCP standards, and thus warrants a finding of no substantial issue pursuant to Coastal Act Section 30625(b)(2) with respect to the grounds on which the appeal has been filed pursuant to Coastal Act Section 30603(a)(5).

Appellant's claims regarding federal preemption should be directed to the City

The Appellant's appeal argues extensively as to why the City's denial and the LCP provisions themselves are preempted by the TCA as "effectively prohibiting" wireless service, in specific contradiction with 47 USC section 332(c)(7)(B)(i)(II). The appeal further expounds upon the differing standards that the Ninth Circuit and the FCC have determined result in effectively prohibiting wireless service for purposes of the TCA.³

As a factual matter, under the Ninth Circuit standard the appellant does not explain how IP Section 17.46.020.A, which only prohibits wireless facilities within the R-1 zoning district, results in a "city-wide general ban" since, logically speaking, it follows that a prohibition within only one zoning district necessarily means that such a ban is limited in scope and *not* a "city-wide" or "general" ban. As a legal matter, whether the City's denial of the proposed development prevents the Appellant from filling a "significant gap" in service by "the least intrusive means" (the Ninth Circuit standard) or "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment" (the FCC standard) is a question of interpretation under the TCA. These questions have no bearing on whether the proposed development is consistent with the LCP standards, and thus warrants a finding of no substantial issue pursuant to Section 30625(b)(2) with respect to the grounds on which the appeal has been filed pursuant to Section 30603(a)(5).

Regardless of whether the Ninth Circuit or FCC (or some other) standard should apply to determine whether the City's denial effectively prohibited wireless services in contradiction with the TCA, the Coastal Commission has no statutory basis to accept an appeal of a CDP decision

³ According to the Ninth Circuit, a local government effectively prohibits wireless service "either by adopting a city-wide 'general ban' on wireless facilities, or by individual denials that prevent a provider from filling a significant gap in service by the least intrusive means." (*MetroPCS v. City and County of San Francisco* (2005) 400 F.3d 715, 731.) However, the FCC apparently deemed the Ninth Circuit standard too narrow and instead takes the position that "a state or local legal requirement constitutes an effective prohibition if it materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." (FCC Small Order 18-133 ¶ 35.)

on such a basis (*i.e.*, for the purpose of resolving potential questions of preemption). Given that the City denied the CDP application in the first instance, presumably it considered these issues when taking action. Again, on this point, it is worth noting that the City's denial findings state: "Legal counsel has advised the City that we should adhere to our local regulations and not assume that they are preempted by Federal or State Law." Thus, the Appellant's assertions in this regard are more appropriately directed to the City, rather than the Coastal Commission.

As discussed above, it does not appear that IP section 17.46.30 is actually preempted by section 332(c)(7)(B)(iv) of the TCA in regards to the LCP's regulation of RF emissions, but whether it is or not is simply outside the scope of the allowable grounds for an appeal of the City's denial of a CDP for a major public works project per sections 30603(a)(5) and (b)(2) of the Coastal Act. Therefore, this appeal contention has no bearing on whether the proposed development is consistent with the LCP standards, and thus also warrants a finding of no substantial issue pursuant to Coastal Act Section 30625(b)(2) with respect to the grounds on which the appeal has been filed pursuant to Coastal Act Section 30603(a)(5).

F. CONCLUSION

When considering a project that has been appealed to it, the Commission must first determine whether the project raises a substantial issue of LCP conformity, such that the Commission should assert jurisdiction over a *de novo* CDP for such development. At this stage, the Commission has the discretion to find that the project does not raise a substantial issue of LCP conformance. As explained above, the Commission has in the past considered the following five factors in its decision of whether the issues raised in a given case are "substantial": the degree of factual and legal support for the local government's decision; the extent and scope of the development as approved or denied by the City; the significance of the coastal resources affected by the decision; the precedential value of the City's decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance.

In this case, these five factors, considered together, support a conclusion that this project does not raise a substantial issue because: (1) the City provided the factual and legal support demonstrating that the wireless facilities expansion was inappropriate and inconsistent with the City's LCP land use, wireless facilities, and scenic resource provisions; (2) the extent and scope of the proposed facilities are significant due to the extent and scope of the proposed wireless facilities expansion, which would result in wireless facilities generally 16 - 25 feet taller than surrounding residential development and even 11 - 13 feet taller than similarly situated utility poles; (3) the coastal resources which would be affected by the decision are significant because the project sites are located within LUP-designated highly scenic and special community areas, which are afforded special protection under the LCP with respect to scenic resources and community aesthetics; (4) the City's decision to deny the wireless facilities will not impact future interpretations of its LCP as the City applied a very straightforward analysis of its applicable LCP provisions, not assuming preemption by other state or federal law; and (5) although the appeal raises significant regional or statewide issues related to the expansion of wireless services and the protection of scenic resources since there are numerous wireless carriers each desiring to expand its service territory and service offerings, both with the potential to result in significant adverse impacts to scenic resources and community aesthetics, this factor alone does not justify a

finding of substantial issue with respect to the appeal taking into consideration the other four factors.

For the reasons stated above, the Commission finds that Appeal Number A-3-CML-19-0200 does not present a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.

A-3-CML-19-0200 (Verizon Wireless Facilities)

APPENDIX A – SUBSTANTIVE FILE DOCUMENTS⁴

- City of Carmel-by-the-Sea Local Coastal Program
- Appeal File Number A-3-CML-19-0200

APPENDIX B – STAFF CONTACT WITH AGENCIES AND GROUPS

- City of Carmel-by-the-Sea Planning Department
- Verizon Wireless Representatives

⁴ These documents are available for review in the Commission's Central Coast District office.